the writing in question will have such a tendency; but in such case, the general rule is that the writing is not admissible in evidence to corroborate his testimony. WIGMORE, § 763. The reason underlying the refusal to admit the writing in evidence when it is used merely as an aid to the memory of the witness would seem to be indicated either in the nature of the writing itself or in the absence of the element of necessity. The writing need not be of such a nature that it would be admissible as evidence of the facts it asserts if it did not refresh the witness' recollection; and if it is not, it should not be admissible. And the courts generally further hold that even though the memorandum fulfills all of these requirements, the evidence of the facts therein contained having been obtained from the witness' oral testimony, there is no necessity for the admission of the memorandum. The Vermont court is, however, in this respect consistent with its holding in the principal case and admits the memorandum for the purpose of confirming the oral testimony of the witness. *Lapham* v. *Kelly, supra.* In the instant case, that court has merely taken the next logical step in holding the memorandum admissible independent of the fact as to whether or not it refreshes the witness' memory. Those courts which hold the memorandum inadmissible when used to refresh the present hazy recollection of the witness, *a fortiori,* would exclude it as clearly within the principle of the hearsay rule where it is not necessary for that purpose—*i.e.,* under the circumstances of the instant case.

It remains to be considered whether any argument based upon principle and reason can be made to sustain the holding of the Vermont court. The exclusion of the memorandum is based upon the hearsay rule. The objection offered by the hearsay rule would, however, seem to be met by the requirements of the Vermont court, for it must be shown that the memorandum was made by the proper person, with the proper knowledge, at the proper time, and it must be guaranteed by him under oath and he can be examined as to the truth of the facts therein embodied, whereas he cannot be in the case where he has no present recollection, in which case the memorandum is admissible. And it would further seem that the writing under these circumstances would be better evidence of the facts contained therein than the mere uncorroborated account of the witness based upon an independent present recollection of those facts which lie in his mind more or less hazily and dimmed by lapse of time, and it ought to be admissible in evidence in confirmation of that account. Surely in every-day affairs the average person would give to it more weight and consider it as worthy of greater consideration. *Contra, Wightman* v. *Overhiser,* 8 Daly (N. Y.) 282.

W. F. W.

JURISDICTION OVER NON-RESIDENT DEFENDANT.—While judicial inability to comprehend the rationale of a given authoritative pronouncement is not exactly uncommon, it is rarely that so glaring an illustration of it is encountered as in a case recently decided by the District Court of the United States for the Northern District of California, Second Division. The case, which

was decided by Judge VAN FLEET, is *Fry* v. *Denver & R. G. R. Co.*, 226 Fed. 893.

In that case the court came to the extraordinary conclusion that the courts of a state cannot acquire jurisdiction over the person of a foreign corporation *doing business in the state,* unless the action arises out of the business so done in the state, or unless the corporation voluntarily waives its right to object to the jurisdiction. The bare statement of the proposition, divorced from the reasoning which evolves it, is positively shocking in its disregard for every fundamental principle of jurisdiction. But when the cases upon which the court purports to have relied in reaching its conclusion are examined, one is forced to wonder how so able a jurist as Judge VAN FLEET could have missed the mark so completely.

As a matter of fact, not only is the proposition clearly unsound in principle, but it is without a syllable of support in the Supreme Court cases from which it is supposed to be deduced (*Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492, noted in 13 MICH. L. REV. 520).

The facts of the principal case were simple: Plaintiff was injured in Colorado while a passenger on one of defendant's trains; suit was brought in the State Court of California, the complaint alleging that the defendant was "doing business" in California; the defendant removed the suit to the Federal Court on the ground of diversity of citizenship and then demurred for want of jurisdiction of the court over the person of the defendant. The demurrer was sustained on the ground that the action did not arise out of the business defendant was doing in California, and that therefore the objection to the jurisdiction was well taken. Defendant was a Colorado corporation.

The report does not show clearly how or upon whom service was made, but the clear implication (from the court's language in applying the Supreme Court cases) is that it was made *upon an agent of the defendant corporation.*

By way of contrasting the situation thus presented, it is interesting to note the facts of *Simon* v. *Southern Ry. Co., supra,* which was one of the two cases relied upon by the defendant in its argument and by the court in its opinion. The cases differed in many respects, but we shall state only so many of the facts as illustrate the precise distinction we are making.

Plaintiff, a resident of Louisiana, started a suit in a State Court of Louisiana, claiming to have been injured by reason of a collision while he was a passenger on a train of the defendant, a Virginia corporation; and he alleged that the defendant had failed to comply with § 1 of the Louisiana foreign corporation act, requiring foreign corporations to file a written declaration setting forth the places in the state where they were doing business, and the names of their "agents in this state upon whom process may be served." Another section of the foreign corporation act provided as follows: "Whenever any such corporation shall do any business of any nature in the state without having complied with the requirements of § 1 of this act, it may be sued for any legal cause of action in any parish of the state

where it may do business, and such service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served." Ostensibly acting under that statute, a summons was issued and served on the Assistant Secretary of State of Louisiana. No notice of the service of the summons or of the pendency of the suit was given to the defendant, and it was only after the plaintiff had recovered a judgment that the defendant learned of the suit. The case which terminated in the Supreme Court of the United States was a suit to enjoin the enforcement of the judgment.

The Supreme Court held that the judgment was void for want of jurisdiction in the State Court; for the reason that service *on the Secretary of State,* under the statute, did not constitute due process of law so far as it related to an action not connected with the business the defendant was doing in Louisiana.

The ground of the decision by the Supreme Court is explicitly limited by the Court, which says:

> "We * * * put the decision here on the special fact, relied on in the court below, that in this case the cause of action arising [?] within the State of Alabama, and the suit therefor, was served on an agent designated by a Louisiana statute."

The court not only addressed its whole argument to the effect of service upon an "agent" designated by a statute compulsory in form, but it expressly refrained from "discussing the right to sue on a transitory cause of action and serve the same on *an agent voluntarily appointed.*"

Nevertheless the court in the *Fry* case construed the opinion in the *Simon* case to cover a case in which service was regularly had on an agent, voluntarily appointed, of the defendant, and to make it impossible to sue a foreign corporation in any state, other than the state of its residence, on a cause of action not connected with the business done in such foreign state.

Thus the court said, at page 895: "While, as indicated, service of process in that case was had upon a designated official of the state, and not an agent of the corporation, the language employed by the court is, as suggested by counsel for defendant, obviously as applicable to the latter case as to the former, since manifestly, under the principles announced by the court, the basis of all process on a foreign corporation is its actual or implied assent, by entering the state and doing business there, to its being served in accordance with the statute of the state, whether such service be had on an officer of the state or an agent of the corporation. In either case, such assent without the voluntary appearance of the defendant may only be implied as to process in actions founded on contracts originating within the state of service."

In a limited sense, what the court says is sound. It is true, for instance, that the liability of a corporation to suit elsewhere than at its domicile is only such as is created by statute; and it is likewise true that the power of the legislature of a state to impose such liability has its origin in a contract relationship. It may exclude foreign corporations from its state entirely or admit them on such terms as it may see fit to impose.

When the legislature has spoken, declaring the conditions it wishes to impose, the corporation, if it desires to do business on those conditions, either *expressly* assents to the conditions, or, by doing business in the state, *impliedly* assents.

In either case the corporation comes into the state and is there by its agents—the only way in which a corporation can be anywhere. It has consented to be sued in the state. As to certain business—the business done in the state—it may be served in any mode that the statute has designated; as to other business it may still be sued in the state, but in such case it must be *personally* served—that is, service must be made on one of its agents, not thrust upon it by the state and only impliedly assented to, but *appointed by the corporation voluntarily.*

Any other doctrine would give a foreign corporation a distinct advantage over an individual. For instance, a citizen of Colorado may commit a tort in Colorado and then go to California. Of course such a *cause of action* is cognizable in the courts of California, and the defendant, if served personally, cannot complain that he was deprived of due process of law.

All that the Supreme Court has said is that *implied* assent to service on an agent *designated by the state,* which is given in exchange for the right to do business in the state, and which does not expressly extend to business done outside the state, will not be extended by implication to business so done; that therefore as to *such* business service on such an agent is not due process of law; and that a judgment procured on such service without a voluntary appearance is void for want of jurisdiction of the court. Doubtless, since the whole question of the right of a foreign corporation to do business is a question of *contract,* even the difficulty raised by the *Simon* case could be obviated—at least as to corporations which *expressly* assent to the statutory provisions by formally complying—by broadening the language of the statute so as to make the statutory agent a proper person to serve *in all actions,* whether connected with business done in the state or elsewhere.

In any event the question raised by the *Simon* and *Wayne* cases is purely a question of what constitutes due process of law—a point which the court in the *Fry* case completely overlooked. It is not at all a question of the jurisdiction of a particular cause of action; but rather of what service is necessary to confer jurisdiction of the person of the defendant. The character of the cause of action, and the nature of the business from which it originates, are wholly immaterial except as they bear upon the question of the sufficiency of what may be termed "substituted" service. If the business was done in the state, then service on a state officer named by the statute is sufficient, *since as to such business the defendant has consented to such service;* otherwise, service must be had in the regular way on one of the corporation's *own officers or agents.* For in either case due process of law requires service upon an agent of the corporation; and the authority of the implied appointee, a state officer, as such agent is held to be limited by the purpose of his appointment.

In addition to the foregoing considerations raised by *Fry* v. *Denver & R. G. R. Co.,* the case presents another curious feature (if the statement

in the syllabus that the plaintiff was a non-resident is correct) which suggests that possibly even as to the point we have discussed the court did not receive as much aid from counsel for the plaintiff as it should have had.

The action, it will be recalled, was brought in a State Court of California, against a Colorado corporation. The first syllabus paragraph suggests that the plaintiff too was a non-resident of California, although the opinion itself discloses no facts from which the correctness or incorrectness of this suggestion appears.

Nevertheless the defendant removed the action to the Federal Court on the sole ground of diversity of citizenship. Clearly, if both plaintiff and defendant were non-residents of California, the District Court in California was without jurisdiction, and a motion to remand to the state court would have had to be granted. But no motion to remand seems to have been made, although in a case such as the *Fry* case the State Courts almost certainly would have constituted a forum more favorable to the plaintiff than would the Federal Courts. Since the requirement that suit shall be brought in the district of which either the plaintiff or the defendant is a resident is one of "venue" more accurately than of jurisdiction, the plaintiff waived his right to object by proceeding on the merits and the court properly undertook to decide the questions involved—even if it did, according to the view hereinabove expressed, decide the case incorrectly.

C. E. ELDRIDGE.